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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 125

EMERY & KAUFMAN, LTD.
Petitioner

versus

ADD A. HEYL
Respondent

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner seeks certiorari to review the judgment of the Supreme Court of Louisiana herein; and in support of its petition respectfully shows:

OPINIONS BELOW AND JURISDICTION

The original opinion of the Supreme Court of Louisiana, one justice dissenting, was rendered on November 8, 1954. Rehearing was granted on December 13, 1954. The opinion on rehearing, in which the court reversed itself, one judge dissenting, was rendered on March 21,

1955. The dissenting opinion on rehearing was filed March 23, 1955. Application for a second rehearing was denied without opinion on April 25, 1955. None of the opinions has as yet been reported.*

Jurisdiction of this court lies under 28 USC 1257.

QUESTION PRESENTED

The important question of federal statutory construction—novel in this court—here presented for determination is:

> May a local insurance agent plead a discharge in bankruptcy in bar of a suit to recover premiums which he has converted in violation of an express contract to remit them to his general agent, on the ground that the premiums were not held in a "fiduciary capacity" within the meaning of that term as used in section 17(a)(4) of the Federal Bankruptcy Act?

The instant decision of the Supreme Court of Louisiana is directly contrary to that of the Supreme Court of Minnesota in an identical case, and is contrary to decisions of federal courts and of the highest courts of other states in closely analogous cases.

The question whether such premiums are held in a fiduciary capacity, or are mere debts dischargeable in bankruptcy, vitally affects the entire insurance industry, and the existing conflict should accordingly be resolved

*The opinions are reproduced in the Appendix hereto.

by this court to achieve uniformity of application of the national bankruptcy statute.

STATUTE INVOLVED

The statute involved is section 17 of the Federal Bankruptcy Act (30 Stat. 550) as amended (52 Stat. 851), whose pertinent portions provide that "discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting . . . in any fiduciary capacity . . ." 11 USC 35(a).

STATEMENT OF THE CASE

Petitioner is a general insurance agency which, by written agreement, appointed respondent a local agent. The agreement authorized respondent to collect premiums on policies sold by him for petitioner's account, permitted him to deduct his commissions therefrom, and obligated him to remit the net premiums to petitioner within sixty days after sale of the policies.

Respondent misappropriated certain premiums instead of remitting them to petitioner, and thereafter filed a voluntary petition in bankruptcy.

Petitioner filed this suit in a state court to recover the misappropriated premiums; and respondent pleaded his bankruptcy in bar.[1]

The state trial court held that the premiums were misappropriated by respondent while acting in a fiduciary capacity, and that his liability therefor was accordingly not dischargeable in bankruptcy; and it rendered judgment for petitioner.[2]

On respondent's appeal, in which the question of dischargeability in bankruptcy of his liability in suit was raised by specification of error in his brief, as required by the Rules of the Supreme Court of Louisiana, that court affirmed the holding and judgment of the state trial court in petitioner's favor, one justice dissenting.

On rehearing, the Supreme Court reversed its own prior decision, and held that respondent had not been acting in a fiduciary capacity when he converted the premiums.

The justice who had read the court's original opinion dissented, pointing out that the decision of his colleagues was contrary to the early precedent established, and since followed by every other court which has passed on the question.[3]

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[1] Answer, R 10-11.

[2] R 50. Appendix, pp. 9-10, *post*. After rendition, but before signing of the judgment, respondent was granted his discharge in bankruptcy by the federal court.

[3] The dissenting justice urged that, because of the nature of the insurance business, certain early decisions of this court cited by the majority, construing, generally, former statutory provisions from which the section of the Bankruptcy Act here involved derives, had been considered inapplicable to the insurance-agency situation by the other courts which have decided the point. All of the opinions of the justices of the Supreme Court of Louisiana are given in the Appendix, pp. 10-32, *post*.

ARGUMENT

The federal statutory provision here at issue is that which specifies the classes of debts not dischargeable in bankruptcy.

Current bankruptcy practice leaves to the various state courts, primary responsibility for determining whether particular debts are dischargeable in bankruptcy.

As happened in the case at bar (R 61-62), the bankruptcy courts ordinarily decline to pass on this question, referring it instead to the courts in which suits have been filed for recovery of the particular debts concerned.

This court has never decided the question of dischargeability of the type of debt here involved.

The opinion, review of which is sought, relied on early decisions of this court with respect to other types of debts —decisions whose inappropriateness to determination of the specific question here in issue was recognized in the original opinion of the Supreme Court of Louisiana below, as well as in the decisions of all other courts which have passed on the question.[4]

[4] Of these decisions of this court, *Upshur vs Briscoe*, 138 US 365, 375 (1891), involved only liability for moneys left with the debtor under "terms (which) made Briscoe the owner of the (sum) . . . in his own right", not a holder thereof in a fiduciary capacity; *Noble vs Hammond*, 129 US 65, 66 (1889), dealt with breach of an agreement to collect an account which, so far from imposing a trust on amounts collected, allowed the obligee to "keep and use the money until they (the creditors) called for it"; *Crawford vs Burke*, 195 US 176 (1904), and *Hennequin vs Clews*, 111 US 676 (1884), involved sales of hypothecated collateral (held under agreements imposing no trust thereon) either in breach of the agreement or without accounting for the proceeds, the rationale of the decisions being that

The final opinion below is accordingly at variance with every other decision on the point involved.

As stated at the outset, the decision of the Supreme Court of Minnesota in *American Surety Company vs Greenwald*, identically the same in its facts as the case at bar, is in direct conflict with the decision below.[5]

All of the other courts which have considered the question, have done so in cases so closely analogous in their facts to that at bar that their opinions may fairly be said also to be directly contrary to the decision below.[6]

"the creditor who holds a collateral holds it for his own benefit . . . (and) is in no sense a trustee" (111 US at 682); no question of "fiduciary capacity" was present in *Neal vs Clark*, 95 US 704 (1877) —only whether a debt created by constructive, not actual, fraud is dischargeable; and *Chapman vs Forsyth*, 2 How. 202 (1844), involved the debt of a factor for the proceeds of cotton sold for his principal, held, under *ejusdem generis* principles applied to analogous portions of the bankruptcy act of 1841, to have been dischargeable.

[5] 223 Minn. 37 (1946). *In re Chandler Ins. Agency*, 92 FS 878 (DC Md.-1950), involving the right of insurance companies to trace into the hands of their bankrupt agent premiums collected for their account, is equally indistinguishable from the present case.

[6] *Citizens Mutual Automobile Ins. Co. vs Gardner*, 315 Mich. 689 (1946), *Travelers Ins. Co. vs Bishop*, 298 Mich. 600 (1941), *Guernsey-Newton Co. vs Napier*, 151 Wash. 318 (1929), and *Matter of Mountain*, 45 Am. Bankr. Rep. (ns) 414 (Ref. Cal.-1941), are distinguishable only insofar as they may be considered to turn on state statutes—the constitutional effect of which on the uniform application of a federal statute is at least problematical—providing that premiums received by any insurance agent should be deemed received "in his fiduciary capacity". *Morgan vs American Fidelity Fire Ins. Co.*, 210 F2d 53 (CA 8-Ark.-1954), is really not distinguishable at all, except that the agency agreement contained an express provision that premiums received by the agent "shall be held in a fiduciary capacity". See the opinion of Chesnut, DJ, in *In re Chandler Ins. Agency, supra*, note 5: "The legal and equitable obligations of a fiduciary result from the real nature of the relationship between the parties, and not merely upon the literal wording of their contract." 92 FS at 881.

The magnitude and nation-wide scope of the insurance business were delineated by this court in *United States vs South-Eastern Underwriters,* 322 US 533 (1944).

The importance to that business of nation-wide uniformity of application of the rules governing dischargeability in bankruptcy of the liability of insurance agents for misappropriated premiums, is obvious.

It is respectfully submitted that the question presented is of such gravity, and the need for resolution of the present conflict in decisions so evident, as to warrant review by this court of the divergent construction below of the important federal statutory provision at issue.

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June, 1955

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JUDGMENT OF THE TRIAL COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

No. 303-640 DIVISION "E" DOCKET # 4

EMERY & KAUFMAN, LTD.

vs

ADD A. HEYL AND ADD A. HEYL, INC.

This matter came up for hearing and was taken under advisement.

PRESENT:

Robert E. Leake, Jr. (Deutsch, Kerrigan & Stiles), attorney for plaintiff.

Claude F. Kammer, attorney for defendants.

THIS matter having been heretofore submitted to the Court for adjudication, and when, after considering the pleadings, evidence and argument of counsel, and the court being of the opinion that plaintiff is entitled to a judgment in the sum of $9,012.68, of which $8,780.37 is not dischargeable in bankruptcy by Add A. Heyl, for the reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Emery & Kaufman, Ltd., and against defendants, Add A. Heyl, Inc., now in liquidation, and Add A. Heyl, individually and in solido, in the full sum of nine thousand and twelve and 68/100 DOLLARS ($9,012.68), together with legal interest from judicial demand until paid, and all costs; and that of said amount, $9,012.68, the sum of $8,780.37 with interest, as herein provided is not dischargeable in bankruptcy by Add A. Heyl.

JUDGMENT READ AND RENDERED IN OPEN COURT ON THIS 29th DAY OF MAY, 1952.

JUDGMENT READ AND SIGNED IN OPEN COURT ON THIS 6th DAY OF JUNE, 1952.

(s) F. J. STICH
JUDGE

ORIGINAL OPINION OF THE SUPREME COURT OF LOUISIANA,
November 8, 1954

MOISE, Justice:

The gravamen of this appeal presents the issue of the dischargeability or non-dischargeability of a debt in bankruptcy. The judge of the district court held that the debt, under the circumstances of record, was non-dis-

chargeable in bankruptcy, and because of that decision this appeal is prosecuted.

The facts are as follows:

The General Agency of Emery & Kaufman, Ltd., party of the first part, and Add A. Heyl, party of the second part, the Local Agent, made an agreement relative to an Agency Contract, the first lines of that agreement reading:

> "*In consideration of the General Agent's making its underwriting facilities available to the Local Agent,* and in consideration of the other mutual covenants, stipulations and agreements hereinafter set forth, the parties hereto agree as follows:" (Underscore ours)

An examination of the contract as a whole leads us to believe that the intent of the parties was to make a continuous agency agreement with no fixed terms, but which could be terminated by either party upon notice. However, the agreement was fully enforceable until terminated. The rate of commission to be received, for making available the use of the General Agency's underwriting facilities and other covenants, is fixed in the schedule annexed to the contract. The contract sets forth that the Local Agent is to write insurance protection through the underwriting facilities; that the policies are to be approved by the General Agency; and that the Local Agent is to pay his own expenses in the conduct of his business and is to receive compensation as fixed in the schedule, but he is in duty bound to pay to the General Agency the

sums which were held in trust by the Local Agent and which must be paid after the delivery of the contracts of insurance, making the protection sought by the assured complete.

The Local Agent received his compensation, the General Agent performed his part of the agreement, but the Local Agent failed to remit to the General Agency the funds entrusted to his care because he made a conversion of these funds to his own use. Thereupon, the General Agency terminated its contract, had an audit made and there was shown by that audit, as of December 31, 1950, to be due to the General Agency the sum of $9,012.68, after giving to the appellant all credits in conformity to the agreement.

The appellee brought suit for recovery. Mr. Heyl filed a petition in bankruptcy, and in his reason as to the dischargeability of the debt by bankruptcy, the referee stated:

> "This is a question for another court of proper jurisdiction. Bankruptcy courts are not required or expected to pass on the question of dischargeability. The bankrupt's discharge, if one is granted herein, will be a discharge of all of his dischargeable debts."

Mr. Heyl received his discharge, and he excepted to the jurisdiction of the Civil District Court on the grounds that subsequent to the filing of the action by appellee he had filed his voluntary petition in bankruptcy and had been adjudicated a bankrupt. On June 2, 1952, after

this suit was tried and judgment rendered (but before judgment was signed), Mr. Heyl was given his discharge. This is stated by appellee in its brief, and this fact has not been contradicted by appellant.

Appellee, in endeavoring to get payment, obtained the insurance policy held on the life of appellant. The policy value is not shown. This act did not constitute a condonement of the debt, nor a novation. In fact, such was not even argued, but the appellant is vigorously contending that—

"1. This agreement is unenforceable because it contains a potestative condition;

2. The indebtedness is one which is dischargeable in bankruptcy;

3. The appellee's claim has prescribed.

We must take into consideration the completed transactions shown in the record, which should be viewed in the light of consequences, and then apply the law.

In the suit of *Board of Commissioners v. Concordia Abstract & Realty Company,* 181 La. 373, 159 So. 588, 12 La. Law Review 103, we held:

> "An obligation which has been made subject to a potestative condition becomes a valid and enforceable obligation when the condition on which it originally depended has been fulfilled."

This suit was viewed in the light of consequences of the completed transaction, before applying the law.

The record discloses that the transactions were fully completed as to the benefits of appellant—he having received full compensation for his work. It was appellant's conversion of entrusted funds that compelled the appellee to file suit for recovery. Appellee's underwriting facilities were furnished; it did not arbitrarily refuse policies tendered by appellant for approval. There is no potestative condition apparent, because during the life of the agreement the execution of the agreement was not dependent on the act of either party, because the transactions were completed. A potestative condition is "that which makes the execution of the agreement depend on events which it is in the power of the one or the other of the contracting parties to bring about or to hinder." Art. 2024.

The defendant argues that the contract is invalid because of the provisions of Articles 3034 and 3024 of the Revised Civil Code. We think that this contention is erroneous, because the contract states a serious consideration, in that the General Agency agreed to make and did make its underwriting facilities available to the defendant. And, this consideration was real, actual, and did not depend on whim or caprice.

In the case of *Cali v. National Linen Service Corporation*, 38 F.(2d) 35, it is stated:

> "In the construction of Articles 2024, 2034, and 2035 of the Civil Code, the Supreme Court has clearly announced the rule that, if the potestative agreement is supported by a serious consideration, the contract is not void. For example, an agreement by a lessee to drill an oil well, which may be

> postponed indefinitely by the payment of $4 quarterly, with the option in the lessee to abandon the lease on the payment of $2, is held to be potestative as not based on a serious consideration, while practically the same agreement, but based on a consideration of $100, was held to be not potestative and valid. Murray v. Barnhart, 117 La. 1023, 42 So. 489, and authorities therein cited; Anse La Butte Oil & Min. Co. v. Babb, 122 La. 415, 47 So. 754; Girault v. Feucht, 117 La. 275, 41 So. 572."

See also, *Humble Oil & Refining Co. v. Guillory, et al.*, 212 La. 646, 33 So.(2d) 182; and *Martin-Parry Corp. v. New Orleans Fire Detective Service*, 221 La. 677, 60 So.(2d) 83.

The second objection raised by the defendant is the one relating to the discharge of this debt in bankruptcy. The Bankruptcy Act, 11 U.S.C.A., Page 271, Section 35, states:

> "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; * * *"

In the suit of *Vertman v. Drayton*, 272 N.W. 438, it was held:

> "A person is said to receive money in a fiduciary capacity when the money is not his own

> or for his benefit, but is for the benefit of another person to whom he stands in a relation implying great confidence and trust on the one part and a high degree of good faith on the other."

The very nature of the relationship is self-imposed by the contract itself in Paragraph One, and it would seem that the facts of the case is comprehensive and complete in its meaning by the law.

The case of *American Surety Co. of New York v. Greenwald*, 25 N.W.(2d) 681, was a case where the facts are almost identical. There it was held as shown by the syllabus from which we quote:

> *"Where by arrangement entered into between defendant and an insurance company it was expressly provided that defendant was to collect certain premiums for the company and, after deducting his commissions, that he was to remit the balance to the company, held that an express trust was created; that defendant was acting in a fiduciary capacity thereunder within the meaning of sec. 17, sub. a (4) of the Bankruptcy Act, 11 U.S.C.A., sec. 35, sub. a (4); and that the debt created by defendant's wrongful failure to remit to the company the moneys thus collected was rendered non-dischargeable in bankruptcy."* (Underscore ours)

See also *Morgan v. American Fidelity Fire Insurance Company*, 210 F.(2d) 53, U. S. Court of Appeals, Eighth Circuit, Feb. 3, 1954.

The language of the Bankruptcy Statute on dischargeability reads:

> "Whether the defendant's failure to turn in his collections constitutes a fraud, embezzlement, misappropriation or defalcation."

We must consider this language.

In the case of *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.(2d) 510, it is stated:

> "Colloquially perhaps the word, 'defalcation,' ordinarily implies some moral dereliction, but in this context it may have *included innocent defaults, so as to include all fiduciaries who for any reason were short in their accounts.*" (Underscore ours)

In the case of *Citizens Mutual Automobile Insurance Company v. Gardner*, 24 N.W.(2d) 410, 315 Michigan 689, the Court held that where an insurance agent had received premiums and failed to remit to the insurer, such action constituted a defalcation in fiduciary capacity and was not dischargeable in bankruptcy. The Court stated:

> "Under the construction of the pertinent provision of the bankruptcy act indicated in the foregoing cases and others of like import, the conclusion follows that defendant's discharge in bankruptcy *was not a bar to enforcement of plaintiff's judgment against him.* Defendant, as plaintiff's agent was acting in a fiduciary capacity, received the premiums in such capacity, and admittedly failed to make payment thereof to plaintiff as it was his duty to do. Based on the record

before us such failure must be regarded as *constituting a 'defalcation' within the meaning of the bankruptcy act.*" (Underscore ours.)

In the case of *Indemnity Insurance Company of North America v. Leibrock*, 55 N. Y. Supp.(2d) 3, 163 A.L.R. 1010, the Court made the following statement:

"The definition of the word 'defalcation' as included in the decided cases, are far from satisfactory, when applied to the facts established on this motion. The court is mindful of the fact that the word 'defalcation' must be given a meaning different from fraud, embezzlement or misappropriation, and that the word does not necessarily imply dishonesty or fraud. City of Syracuse v. Roscoe, 66 Misc. 317, 123 N. Y. S. 403; Indemnity Insurance Co. of North America v. Covington, 172 Misc. 310, 14 N. Y. S. (2d) 683. The court is also mindful of the fact that it was evidently not the intention of Congress, in enacting the Bankruptcy Act, to exclude all debts incurred by fiduciaries from release by a discharge in bankruptcy. If the Congress had so intended, there would have been no necessity for the limitation of the debts so excluded, by the classification of such debts as those created by fraud, embezzlement, misappropriation or defalcation. Defalcation is commonly defined as 'an abstraction, or misappropriation of money by one, especially an officer or agent, having it in trust.' Webster's New International Dictionary, 2d Ed. 'The failure of one who has received money in trust or in a fiduciary capacity to account and pay over as he ought', 18 C.J. 454, 26 C.J.S. Defalcation, p. 663; 'The failure of a public officer

> to account for monies received by him in his official capacity.' National Surety Co. v. Lanza, Sup., 42 N.Y.S.(2d) 370, 371. The word, as ordinarily understood, implies some bad faith or misconduct, as distinguished from mere negligence or mistake. Central Hanover Bank & Trust Co. v. Herbst, 2 Cir., 93 F.(2d) 510, 114 A.L.R. 769; In re Bernard, 2 Cir., 87 F.(2d) 705. No judicial decision has been called to the Court's attention, in which the word has been construed, as including a negligent failure to collect money, but on the contrary, the reported decisions, in which the word has been construed, concern failures to pay over money collected, due to improper action on the part of the debtor, or on the part of some person or persons for whose actions the debtor was legally accountable. * * *" See, 163 A.L.R. 1003, 1008.

Counsel for the defendant relies on the case of *Upshur, et al. v. Briscoe, et al.*, 138 U. S. 365, 11 S. Ct. 313. This case is distinguishable because there the money held by the defendant constituted a loan, and under the circumstances he was only under the obligation to pay plaintiff and her heirs up to the extent of their interest. In other words, no fiduciary relationship existed.

The appellant files a plea of prescription. If appellee's suit were for damages resulting from offenses or quasi offenses, appellant's plea of prescription might be proper. Appellee's claim, however, is not *ex delicto* in any sense, but is founded on contract, and a prescription of ten years applies.

Our conclusion is that the district court correctly found for appellee—that the debt is non-dischargeable in bankruptcy; otherwise, the bankrupt would profit by his own wrong. 195 U.S. 176, 49 L. Ed. 147.

For the reasons assigned, the judgment of the trial court is affirmed.

DISSENT FROM THE ORIGINAL OPINION, November 8, 1954

HAMITER, Justice, dissenting:

The important question to be determined in this cause is whether the discharge in bankruptcy of appellants (the defendants conducting a local insurance agency) effected a release of their indebtedness with appellee (plaintiff corporation carrying on a general insurance agency) which was in the amount of $9012.68 and arose out of business operations between the two pursuant to a written agency contract.

According to the Federal Bankruptcy Statute, 11 USCA, Section 35(a), "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * * (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; * * * *."

The phrase "in any fiduciary capacity", as contained in the exception to the general rule, has consistently been limited in its application to technical trusts and trusts which have been actually and expressly constituted by the parties. Ordinarily it does not apply to acts of agents, commission men, bailees, brokers, factors, partners, and other persons similarly situated; nor does it relate to trusts which are merely implied by law from contracts. *Upshur et al. v. Briscoe et al.*, 37 La. Ann. 138, also 138 U. S. 365, 34 L. Ed. 931; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565; *Nobel v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Davis v. Etna Acceptance Company*, 283 U. S. 327, 79 L. Ed. 393; Collier on Bankruptcy, Volume 1, Section 3589, pages 851 and 854.

Appellee herein contends that the mentioned contract created a "technical trust", as a result of which appellants operated in a fiduciary capacity; and, hence, that the indebtedness was not released by the discharge in bankruptcy. Appellants, on the other hand, insist that their relationship with appellees was solely that of agent and principal or debtor and creditor.

I am convinced that in the conduct of their local insurance agency the appellants did not act in any fiduciary capacity toward plaintiff, within the meaning of the bankruptcy statute, so as to prevent a release of their indebtedness by the discharge. The written contract which governed all of their operations made no mention whatever of the existence of a trust relationship. Rather, as its provisions disclose, it contemplated appellants' carrying on a separate and distinct undertaking in the

nature of a local insurance agency, with considerable discretion being vested in them, subject of course to proper and timely accounting to and certain supervision by appellee.

In the contract, for example, authority was granted appellants "* * * * to issue and deliver policies, bonds, certificates, endorsements and binders which the General Agent may, *from time to time*, authorize to be issued and delivered; to cancel such policies and bonds in the discretion of the Local Agent, where cancellation is legally possible; to collect, receive and receipt for premiums on insurance tendered by the Local Agent to, and accepted by, the General Agent; and to retain out of premiums so collected, as full compensation on business so placed through the General Agent, commissions at the rates set out in said Schedule 'A'; * * *." (Underscoring mine)

Further, the contract stated that "In the event of the termination of this agreement, the Local Agent's records and the use and control of his expirations shall be and remain the property of the Local Agent, and be left in his undisputed possession, provided he has promptly accounted for and paid over all premiums for which he may be *liable*; * * *." And, "The General Agent shall not be responsible for Local Agency expenses such as rentals, transportation facilities, clerk hire, solicitors' fees, postage, advertising, exchange, personal local license fees, adjustments by the Local Agent of losses under policies issued by the Local Agent, or any other Local Agency expenses whatsoever." (Underscoring mine)

To be noted also are these provisions of the contract: "Monthly accounts will be prepared by General Agent and forwarded to Agent shortly after close of month. * * * Balances are to be paid at the New Orleans office of General Agent not later than sixty (60) days after the close of the month in which the business covered by such account was written. * * * In conducting your agency, the companies are to enjoy the benefit of your careful judgment and conservatism must govern, so that our relations will prove mutually beneficial and enduring."

The cases relied on by appellee herein for rendering applicable the exception to the general rule, and those cited in the majority opinion in support of its conclusion, do not appear to be appropriate. For the most part they involve either (1) a technical or an express trust or (2) a state statute declaring that premiums received by an insurance agent are held by him in a fiduciary capacity.

As to the latter alternative the following is to be found in Collier on Bankruptcy, Volume 1, in an annotation at page 1648 of the Pocket Supplement: "N. 14 Agent to collect funds.—In line with the case of *Guernsey-Newton Co. v. Napier*, cited in the Treatise, there is a growing line of authority based on state statutes that premiums received by an insurance agent are received in a fiduciary capacity—contrary to the general rule respecting agents—and that the liability of the agent for a misappropriation, embezzlement or the like is therefore non-dischargeable in bankruptcy. * * *"

Clearly the contract in this cause did not create or provide for any kind of trust. Moreover, there has come

to my knowledge no pronouncement of our Legislature to the effect that a local insurance agency, operating as did these appellants, receives and holds premiums in a fiduciary capacity. Hence, I can conceive of no good reason for this court's departing from the above stated general rule that has been followed consistently by both the federal and state courts.

I respectfully dissent.

OPINION ON REHEARING,
March 21, 1955

PONDER, JUSTICE:

We granted a rehearing in this case because we were not convinced that an express or technical trust was involved. On reconsideration of the case, we have arrived at the conclusion that the agreement between the parties did not disclose an express or technical trust and that, therefore, the debt was dischargeable in bankruptcy. No express trust was created in the contract or by statute and the sole question presented is whether or not the defendant acted in a fiduciary capacity.

It appears that the plaintiff, a general insurance agency, entered into an agreement with the defendant, a local agent, and that the agreement contains no express trust. The pertinent part of the contract is recited in the original and dissenting opinions previously handed down in this case and it is not necessary to repeat them herein.

The important part of the agreement is the manner in which the local agent was to remit the balance due on the premiums to the general agent. According to the contract, monthly accounts were to be prepared by the general agent and forwarded to the local agent and the balance due from the premiums after the local agent had deducted his commission were to be transmitted to the general agent within sixty days after the close of the month. There is no provision in the contract requiring the premiums to be kept in a separate account. Under the contract the funds derived from the premiums could be mingled with the funds belonging to the local agent; all the contract required of the local agent was the remittance of the balance due to the general agent not later than sixty days after the close of the month. Under these circumstances, no fiduciary relationship was established. The phrase, "in any fiduciary capacity", as found in the Federal Bankruptcy Statute (11 U.S.C.A, Section 35(a)), has consistently been limited in its application to technical trusts and trusts which have been actually and expressly constituted by the parties. "The term 'fiduciary capacity' relates to technical or express trusts and not to those trusts which the law implies from a contract or the position of parties to a transaction. (See *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 S. Ct. 9; *Noble v. Hammond*, 129 U. S. 65, 32 L. ed. 621, 9 S. Ct. 235; *Maxwell v. Evans*, 90 Ind. 569, 46 Am. Rep. 234; *American Agri. Chemical Co. v. Berry*, 110 Me. 528, 87 A. 218, 45 LRA NS 1106, Ann. Cas. 1915A 1293; *Woodward v. Towne*, 127 Mass. 41, 34 Am. Rep. 337; *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. 531, 53 LRA 801.) * * *. The mere reposing of confidence in a person with whom one has a

commercial transaction does not create the fiduciary relation intended by the Bankruptcy Act." 6 American Jurisprudence Verbo Bankruptcy, page 1018, para. 796. Citing *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931, 11 S. Ct. 313 and *Goodman v. Herman*, 172 Mo. 344, 72 S. W. 746, 60 LRA 885. Further on page 1019 it is stated:

> "The use of the word 'trust' in an instrument does not make the relation a fiduciary one within the meaning of the exception, where the legal effect of the instrument is not to create a fiduciary relation. (Citing thereunder *Upshur v. Briscoe*, supra). Agents, bailees, brokers, factors, commission merchants, purchasers under conditional sale contracts or trust receipts, and the like, although occupying positions which are popularly known as positions of trust, are not in a fiduciary capacity by virtue of an express trust, so that debts created by their acts in such positions will be excepted from a discharge in bankruptcy."

The rule is well stated in the case of *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 189, 25 S. Ct. 9, as follows:

> "We may remark here in passing that even since the case of *Chapman v. Forsyth*, 2 How. 212, this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts. *Neal v. Clark*, 95 U. S. 704, 708; *Hennequin v. Clews*, 11 U. S. 676, 679; *Noble v. Hammond*, 129 U. S. 65; *Upshur v. Briscoe*, 138 U. S. 365, 375, as

well as in cases in the state courts too numerous for citation."

This rule is equally applicable under the circumstances in the present case.

For the reasons assigned, the judgment of the lower court is reversed and set aside and the plaintiff's suit is dismissed at its cost.

DISSENT ON REHEARING,
March 23, 1955

MOISE, Justice—dissenting:

I respectfully urge the Members of this Honorable Court, who joined in the majority opinion on rehearing, to reopen their minds, re-examine the evidence, take into consideration the interested parties to the agreement, and look to the character of the business itself. They would arrive anew at a decision prompted by full re-examination of the case on all of the facts and applicable law, and I feel that they would reach a different conclusion. When all of the facts are seen and the respective positions of the parties made manifest, the obscuring fallacies must of necessity fall apart.

The majority opinion on rehearing holds that the defendant was not acting in a fiduciary capacity when he mis-appropriated the funds of his principal, because no technical or express trust relationship existed between the

Local Agent and the General Agent. The writer of the opinion relies strongly on the case of *Crawford v. Burke*, 195 U.S. 176, 49 L.Ed. 147, 25 S.Ct. 9. That case involved a transaction between client and broker, and I do not think it is pertinent to the issues here.

The parties to the transactions in the instant case are the Assured, the Local Agent, the General Agent, and the Insurance Company itself. They all have a mutuality of interest. Recognizing such a fact, the State of Louisiana has an insurance code by which the insurance business is regulated under the police powers of the State.

Revised Statutes 22:2 declares:

> "That insurance is a business affected by the public interest and it is the purpose of this Code to regulate that business in all its phases."

Only the General Agent complied with the law of the State of Louisiana. The Local Agent did not so comply, and to engage in this business of trust he had to obtain the underwriting facilities of the General Agent. The very opening lines of their contract provides:

> *"In consideration of the General Agent's making its underwriting facilities available to the Local Agent,* and in consideration of the other mutual covenants, stipulations and agreements hereinafter set forth, the parties hereto agree as follows:" (Underscore ours.)

The Local Agent (in conformity with the annexed schedule of the contract) solicited policies of insurance,

which had to be approved by the General Agent. He then delivered the policies to the assured and collected the premiums which the policyholders paid for protection. The Local Agent was allowed to retain 10 to 25% of the premiums collected, dependent on the nature and character of the policies. He held the balance of 75 to 90% in trust to be turned over to the General Agent, who in turn remitted to the Home Office the agreed proportion. The payment of premiums is as necessary for an insurance business to be a going concern as gasoline is necessary to run an automobile.

The majority opinion on rehearing cites the case of *Upshur, et al. v. Briscoe, et al.*, 138 U.S. 365, 11 S.Ct. 313. In that case, the defendant held funds as a loan. One who borrows money must pay back what he borrows, but the loan funds may be invested and employed at his pleasure.

The factual situation in the instant case is easily distinguished from that set forth in *Upshur, supra.* The premiums collected by the Local Agent were not loaned to him by the General Agent, and, therefore, no debtor-creditor relationship existed between them. The collection of the premiums constituted a sacred trust. When one collects money in a fiduciary capacity, as the Local Agent did in this case, he is not permitted to spend the money as he chooses.

In our original opinion we quoted the case of *Citizens Mutual Automobile Insurance Co. v. Gardner,* 315 Mich. 689, 24 N.W.(2d) 410, in which the facts were identical to

the ones here. The State of Michigan had a statute which provided that an agent was acting in a fiduciary capacity when collecting insurance premiums, but this statute was merely declaratory of that existing relationship.

In the suit of *State v. United States Steel Co.*, 95 Atl.(2d) 740, 12 N.J. 51 (1953), the Court said:

> "The true test of the relationship arises from the nature of the transaction itself and the intent of the parties involved.
>
> > 'The issue of trust or no trust turns almost invariably on proof of intention since the trust arises upon mere expression of the requisite intention.' *Eagle B. & L. Ass'n. v. Fiducia*, 135 N. J. Eq. 7, 37 A.(2d) 116, 118 (Ch. 1944)."

The case of *American Surety Co. of New York v. Greenwald*, 25 N.W. 681, is pertinent to the instant case. There the Court said:

> "* * * There are various statements in bankruptcy treatises and in many decided cases to the effect that to constitute 'fiduciary capacity' within the meaning of subd. a(4) of sec. 17 there must be a technical or expressed trust relationship. It appears to us that the facts in the instant case establish such a technical or expressed trust relationship as to make the position of defendant a fiduciary one within the meaning of subd. a(4) of section 17. In holding that the arrangement existing between defendant and Travelers at the time of the transactions in question constitutes a trust arrangement, we are not achieving that result by ignoring the established prin-

ciples of the law of trusts. The facts here present well establish that defendant received and collected the premiums under and pursuant to clear and definite terms set forth in the written instrument presented to him by Travelers. That instrument specifically prescribes, as to defendant, that after receiving 'the gross premium from the state, you will in turn deduct your total commission as agreed upon in this letter *and that you will then remit the balance to us.*' Thus, defendant received and collected the money as a trustee under an express trust. Bearing upon the question before us is the following from Restatement, Trusts, sec. 12, comment g, which is peculiarly applicable to the facts of the case at bar:

* * *

"That the arrangement here existing between Travelers and defendant constituted an express trust would seem clear under the decisions of this court, illustrative of which is *Wertin v. Wertin,* 217 Minn. 51, 54, 13 N.W.2d 749, 751, 151 A.L.R. 1302, where this court said: 'Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will; or by words either expressly or impliedly evincing an intention to create a trust.' 65 C.J., Trusts, pp. 220, 221, Section 10, B. In our cases we have defined such trust to be 'one created by the parties in language directly and expressly pointing out the persons, property, and purposes of the trust.' 6 Dunnell, Dig. & Supp. Section 9877, and cases in note 95; *In re Estate of Burton,* 206 Minn. 516, 289 N.W. 66."

Another point urged in the majority opinion on rehearing is that the word "trust" is not used in the agreement. In the suit of *State v. United States Steel Co., supra,* the Court held that to constitute a trust it is not necessary that the word "trust" be used.

The third point urged is that the premiums collected by the Local Agent were not segregated. Again, in *State v. United States Steel Co., supra,* the Court said:

> "* * * the * * * facts here, show no segregation of the withholdings. But segregation of funds is only one of many factors to be weighed and considered in ascertaining the true intent of the parties. Failure to segregate the funds is not determinative of the conclusion that the relationship was debtor and creditor. The intermingling of funds in itself does not destroy a trust otherwise evidenced by the intent of the parties."

I respectfully dissent.